In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 688

IN THE MATTER OF THE ESTATE OF LILLIAN ENG, DECEASED

BALDO M. KRISTOVICH, PUBLIC ADMINISTRATOR, PETITIONER

v.

SHU TONG NG

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

MEMORANDUM FOR THE UNITED STATES

By order of the Court dated January 25, 1965, the Solicitor General was invited to express the views of the United States with respect to this case. For the reasons stated below, we believe that the matter is not one which calls for this Court's review.

Lillian Eng, a resident of Los Angeles County, California, died intestate on December 5, 1962. She left real and personal property in California, some of which was community property she had held with her husband who pre-deceased her (Pet. App. A, p. 2). Her survivors were her mother and mother-in-law, citizens of the Republic of China but now residing on the mainland of China, and a brother-in-law, the respondent.

Both the brother-in-law and petitioner, the public administrator for Los Angeles County, applied for letters of administration, invoking Section 422 of the California Probate Code.[1] The probate court awarded the letters to the public administrator, concluding that he had a prior right to them because the mother and mother-in-law were the decedent's heirs-at-law and the brother-in-law would therefore not be entitled to succeed to any part of the estate under California law[2] (Pet. App. A, p. 2). In reaching this determination, the court took judicial notice of a 1946

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[1] That section provides in pertinent part: "Administration of the estate of a person dying intestate must be granted to one or more of the following persons, who are entitled to letters in the following order, the relatives of the decedent being entitled to priority only when they are entitled to succeed to the estate or some portion thereof:"

* * * *

"(7) The relatives of a previously deceased spouse, when such relatives are entitled to succeed to some portion of the estate.

"(8) The public administrator."

[2] See California Probate Code, Section 228.

Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China, 63 Stat. 1300, under Article VIII, Sections 2 and 4 of which (Pet. App. B, pp. 1-3) the contracting parties agreed to permit their nationals to have the benefit of real and personal property left to them within the other party's territory, on the same basis as nationals of that territory. The court concluded that the Treaty guaranteed rights of inheritance to the mother and mother-in-law and that such rights were sufficient to permit them to be declared the decedent's heirs-at-law despite Section 259 of the California Probate Code, which provides that the right of a nonresident alien to take real or personal property located in California by succession or testamentary disposition "upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real [or personal] property upon the same terms and conditions as residents and citizens" of the country of which such alien is a resident (Pet. App. A, pp. 3-4, 10).

The California District Court of Appeals reversed. It recognized that, if the 1946 Treaty were applicable, its provisions would prevail over conflicting provisions of State law (Pet. App. A, p. 5). *Kolovrat* v. *Oregon*, 366 U.S. 187. The appellate court decided, however, that, although the Treaty was generally in force and effect as between the United States and the Republic of China, it was not presently operative to confer in-

heritance rights on the decedent's next-of-kin residing on the Chinese mainland, under the control of the Communist Chinese Government. The court relied upon the existence of a federal policy, manifested by various official acts and declarations of the Department of State, under which this country does not presently regard the 1946 Treaty as controlling the relationship between American citizens and the inhabitants of Communist China (Pet. App. A, p. 7).

On the basis of its ruling that the Treaty did not establish the existence of reciprocal rights of inheritance as between Americans and citizens of the Chinese mainland, the court held that petitioner had not sustained his burden (Section 259.1 of the Probate Code) of proving reciprocity[3] (Pet. App. A, p. 10). It followed that the mother and mother-in-law were not entitled to take the estate; that the respondent brother-in-law's right to do so was revived; and that he therefore had a prior right under Section 422 of the Probate Code to the letters of administration.[4]

The Department of State has advised us that it considers the 1946 Treaty as remaining in force between the United States and the Republic of China, but does not deem the Treaty currently effective with respect to areas on the mainland of China over which the National Government of the Republic of China does not now exercise authority. It invites attention

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[3] The California courts have held that the burden is on the public administrator in a case like the present one. *Estate of Bevilacqua*, 31 Cal. 2d 580, 584, 191 P. 2d 752, 756.

[4] The Supreme Court of California denied further review.

to the fact that, in light of developments on the mainland since 1949, many of the Treaty provisions cannot be given operative effect at this time. Among these are Article II, dealing with rights of residence, travel, and the carrying on of trade throughout the whole extent of the contracting Parties' territories; Articles III and IV, relating to the rights of corporations to be organized and to do business in the Parties' territories; and Article VI, guaranteeing to the Parties' nationals the protection and security of their persons and property as required by international law.[5]

The Department of State has further noted that the United States does not recognize the Peiping government and that that government apparently does not regard itself as obligated to carry out the provisions of the Treaty. Since nationals of the United States thus do not enjoy rights in mainland China by virtue of the Treaty--and specifically that of inheriting property from deceased residents of mainland China—the Department of State concludes that, in present circumstances, there is no legal requirement

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[5] In this connection, we are advised, for example, that travel controls are now maintained by the United States, and that Treasury controls over assets and financial transactions preclude the application of many provisions of the Treaty to the mainland. We are also advised that the institution of unilateral controls by the United States to trade with mainland areas under Communist domination is confirmed by diplomatic exchange between the Department of State and the Ambassador of the National Government of the Republic of China. These controls and regulations exclude from their effect the portions of China under the control of the National Government.

that the Treaty provisions governing inheritance be treated as operative with respect to the mainland of China.

Because of these considerations, it is the policy of the Department of State to consider the provisions of the Treaty as presently suspended with respect to areas of China not under the control of the National Government of the Republic of China. The determination of the court below is fully in accord with that policy. From the standpoint of the United States, there is accordingly no need for review by this Court.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

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